

**PD-0645-19**

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IN THE TEXAS COURT OF CRIMINAL APPEALS

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**MANYIEL PHILMON V. THE STATE OF TEXAS**

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On Discretionary Review of Appeal No. 01-18-00279-CR  
in the Court of Appeals for the First District of Texas

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**APPELLANT'S BRIEF ON THE MERITS**

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## **IDENTITY OF PARTIES AND COUNSEL**

Pursuant to Rule 38.1(a) of the Texas Rules of Appellate Procedure, the following is a list of all trial judges, parties to the trial court's judgment, and respective trial and appellate counsel:

### **Trial Court Judge**

Hon. Louis Sturns, presiding judge

Hon. Magistrate Judge Sheila Wynn, presiding over jury selection

213th Criminal District Court

Tarrant County, Texas

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Manyiel Philmon

## TABLE OF CONTENTS

	<i>page</i>
IDENTITY OF PARTIES AND COUNSEL .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
STATEMENT OF THE CASE.....	1
STATEMENT REGARDING ORAL ARGUMENT.....	2
QUESTION PRESENTED FOR REVIEW.....	3
STATEMENT OF FACTS.....	3
SUMMARY OF THE ARGUMENT.....	5
ARGUMENT AND AUTHORITIES.....	6
QUESTION PRESENTED FOR REVIEW ONE (RESTATED)	
Did the court of appeals erred in holding that conviction in Count Two for assault on a family member did not violate the double jeopardy clause of the Fifth Amendment? .....	6
A. <i>Opinion Below</i> .....	6
B. <i>Controlling Law</i> .....	7
C. <i>Application</i> .....	11
D. <i>Remedy</i> .....	18
PRAYER FOR RELIEF.....	18

CERTIFICATE OF COMPLIANCE.....	19
CERTIFICATE OF SERVICE.....	20

## TABLE OF AUTHORITIES

<i>Cases</i>	<i>page</i>
<i>Belt v. State</i> , 227 S.W.3d 339 (Tex. App.–Texarkana 2007, no pet.).....	8
<i>Bigon v. State</i> , 252 S.W.3d 360 (Tex. Crim. App. 2008).....	8, 9, 18
<i>Blockburger v. United States</i> , 284 U.S. 299 (1932).....	8
<i>Brown v. Ohio</i> , 432 U.S. 161, 97 S.Ct. 2221 (1977) .....	7
<i>Ex parte Chaddock</i> , 369 S.W.3d 880 (Tex. Crim. App. 2012).....	7
<i>Childress v. State</i> , 285 S.W.3d 544 (Tex. App. – Waco 2009, pet. ref’d).....	6
<i>Ervin v. State</i> , 991 S.W.2d 804 (Tex. Crim. App. 1999).....	10, 13
<i>Garfias v. State</i> , 424 S.W.3d 54 (Tex. Crim. App. 2014).....	15
<i>Hall v. State</i> , 225 S.W.3d 524 (Tex. Crim. App. 2007).....	9
<i>Parrish v. State</i> , 869 S.W.2d 352 (Tex. Crim. App. 1994).....	8

<i>Philmon v. State</i> , 580 S.W.3d 377 (Tex. App.– Houston [1st Dist.] 2019, pet. granted) .....	6
----------------------------------------------------------------------------------------------------------	---

<i>Shelby v. State</i> , 448 S.W.3d 431 (Tex. Crim. App. 2014).....	15, 16, 17
------------------------------------------------------------------------	------------

### ***Constitutions***

U.S. CONST. AMEND. V.....	7, 10
---------------------------	-------

TEX. CONST. ART. I § 14 .....	7, 10
-------------------------------	-------

### ***Statutes***

TEX. PENAL CODE ANN. § 22.01(b)(2)(B) .....	2
---------------------------------------------	---

TEX. PENAL CODE ANN. § 22.02(b)(2) .....	2
------------------------------------------	---

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**TO THE HONORABLE TEXAS COURT OF CRIMINAL  
APPEALS:**

Comes now Appellant, Manyiel Philmon, by and through his attorney of record, and respectfully presents to this Court his Brief on the Merits in the named Cause, pursuant to the Rules of the Court.

**STATEMENT OF THE CASE**

On January 27, 2017, Manyiel Philmon (“Mr. Philmon” or “Appellant”) was indicted in two counts for the second-degree felony offense of aggravated assault with a deadly weapon and the third-degree felony offense of assault causing bodily injury on a family member by impeding breath or circulation, both alleged

to have occurred on November 20, 2015. [C.R. 6]; *see* TEX. PENAL CODE ANN. §§ [22.01\(b\)\(2\)\(B\)](#), [22.02\(b\)\(2\)](#).<sup>1</sup>

On February 12, 13 & 14, 2018, a jury trial was held in the 213th Criminal District Court of Tarrant County before the Honorable Louis Sturns, presiding judge.<sup>2</sup> [II, III & IV R.R. *passim*]. The jury found Mr. Philmon guilty as charged on both counts. [IV R.R. 31-32]. Punishment was to the jury, which assessed a sentence of two years incarceration in count one, and five years incarceration in count two but probated that sentence. [C.R. 63, 65; IV R.R. 42]. A timely Notice of Appeal was filed on February 14, 2018. [C.R. 82].

### **STATEMENT REGARDING ORAL ARGUMENT**

The Court's Order granting Mr. Philmon's Petition for Discretionary Review stated that oral argument would not be permitted.

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<sup>1</sup>

Unless set forth otherwise, all statutory citations are to the current versions.

<sup>2</sup>

The Honorable Magistrate Judge Sheila Wynne presided over jury selection on February 12, 2018. [II R.R. *passim*].

## QUESTION PRESENTED FOR REVIEW

**Did the court of appeals err in holding that conviction in Count Two for assault on a family member did not violate the double jeopardy clause of the Fifth Amendment?**

## STATEMENT OF FACTS

In September of 2016, Appellant began dating a woman named Evonne White. [III R.R. 116]. Appellant eventually began spending most nights of the week at Evonne's apartment. [III R.R. 118]. One morning when Appellant was still asleep, Evonne went through Appellant's phone and discovered text messages that showed that he had been unfaithful with other women. [III R.R. 126].

Evonne woke Appellant up and confronted him with her discovery; an argument ensued and Evonne eventually told Appellant to gather his belongings and leave her apartment. [III R.R. 128]. Evonne testified at trial that Appellant gathered all his belongings and clothes in a motorcycle cover, dropped the items into the middle of the living room floor and proceeded to dropping lit matches into the pile in an apparent attempt to start

a fire. [III R.R. 129-30]. At that time, an altercation ensued, in the course of which Appellant pushed and choked Evonne, threatened her with a metal bar, knives and an unloaded pistol, and placed plastic bags over her head in an attempt to suffocate her. [III R..R. 131, 134, 138, 141, 142, 146]. Evonne and Appellant were both screaming during the altercation to the point where a neighbor knocked on the door and called 9-1-1. [III R.R. 150, 151]. Appellant answered the door when the neighbor knocked, so Evonne was able to push him out the door and lock him out. [III R.R. 151]. The police arrived and Appellant was eventually arrested.<sup>3</sup> [III R.R. 79]. Appellant was convicted and sentenced as set forth above.

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Evonne estimated that the entire altercation between her and Appellant lasted approximately one hour. [III R.R. 152].

## **SUMMARY OF THE ARGUMENT**

Appellant was charged and convicted in Count Two with assault causing bodily injury on a family member by impeding breath or circulation. Appellant was also charged and convicted in Count One with aggravated assault with deadly weapon. [C.R. 5; 70, 75]. Based on the language of the indictment and the evidence shown at trial, the offense alleged in Count Two is subsumed by that alleged in Count One.

## ARGUMENT AND AUTHORITIES

### QUESTION PRESENTED FOR REVIEW (RESTATED)

**Did the court of appeals err in holding that conviction in Count Two for assault on a family member did not violate the double jeopardy clause of the Fifth Amendment?**

#### **A. *Opinion Below***

In citing to the Waco Court of Appeals' opinion in *Childress v. State*, 285 S.W.3d 544, 550 (Tex. App.—Waco 2009, pet. ref'd), the court below held,

We agree with the Waco court's analysis. Additionally, we note that the gravamen of appellant's aggravated assault charge was threatening someone with bodily injury with a deadly weapon, here, a knife, a metal bar, a bag, or a metal object, while the gravamen of his dating-violence assault charge was actually causing bodily injury to a person with whom he was in a dating relationship by choking her with his hand or arm. Though the offenses may have occurred during the same criminal episode, we hold that they are not “the same offense” for purposes of the Double Jeopardy Clause. Thus, appellant could be tried and convicted on both counts.

*Philmon v. State*, 580 S.W.3d 377, 382-83 (Tex. App.—Houston [1st Dist.] 2019, pet. granted) (citations omitted).

## **B. *Controlling Law***

The Fifth Amendment's Double Jeopardy Clause, enforceable against the states through the Fourteenth Amendment, provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” [U.S. CONST. AMEND. V](#) (“[n]o person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.”); *see also* [TEX. CONST. ART. I § 14](#). The Double Jeopardy Clause of the United States Constitution protects an accused against multiple prosecutions for the same offense and multiple punishments for the same offense. [Brown v. Ohio](#), 432 U.S. 161, 165, 97 S.Ct. 2221 (1977); [Ex parte Chaddock](#), 369 S.W.3d 880, 882 (Tex. Crim. App. 2012).

Here, Mr. Philmon is being punished twice for the same offense. “When the same conduct violates different criminal statutes, the two offenses are the same for double jeopardy purposes if one of the offenses contains all the elements of the

other.” *Belt v. State*, 227 S.W.3d 339, 344 (Tex. App.–Texarkana 2007, no pet.). For example, “greater inclusive and lesser included offenses are the same for jeopardy purposes.” *Parrish v. State*, 869 S.W.2d 352, 354 (Tex. Crim. App. 1994).

There are two contexts in which a multiple-punishments claim can arise: (1) the lesser-included offense context, in which the same conduct is punished twice — once for the basic conduct, and a second time for that same conduct plus more, and (2) punishing the same criminal act twice under two distinct statutes when the legislature intended the conduct to be punished only once. *Bigon v. State*, 252 S.W.3d 360, 369-70 (Tex. Crim. App. 2008).

When multiple punishments arise out of two distinct statutory violations, the *Blockburger* test is the starting point in analyzing the two offenses. *Id.*; see also *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932). Under *Blockburger*, “the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Blockburger*, 284 U.S. at 304.

When resolving whether two crimes are the same for double-jeopardy purposes, Texas courts focus on the elements alleged in the charging instrument. *Bigon*, 252 S.W.3d at 370. Under the cognate-pleadings approach adopted by the Court of Criminal Appeals, double-jeopardy challenges should be made even to offenses that have differing elements under *Blockburger*, if the same “facts required” are alleged in the indictment. See *Hall v. State*, 225 S.W.3d 524 (Tex. Crim. App. 2007).

It’s important to recognize that the *Blockburger* test is a rule of statutory construction, and not the exclusive test for determining if two offenses are the same—the ultimate question is whether the Legislature intended to allow the same conduct to be punished under both of the statutes in question. *Bigon*, 252 S.W.3d at 370. As a result, the inquiry does not end if the two offenses are not the same under a strict application of the *Blockburger* test. In such a situation, the court examines a non-exclusive list of factors to determine whether two offenses are the same in the context of multiple punishments: (1) whether

the offenses are in the same statutory section; (2) whether the offenses are phrased in the alternative; (3) whether the offenses are named similarly; (4) whether the offenses have common punishment ranges; (5) whether the offenses have a common focus; (6) whether the common focus tends to indicate a single instance of conduct; (7) whether the elements that differ between the two offenses can be considered the same under an imputed theory of liability that would result in the offenses being considered the same under *Blockburger*; and (8) whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes. [Ervin v. State](#), 991 S.W.2d 804, 814 (Tex. Crim. App. 1999). Under the multi-factor tests, Mr. Philmon's multiple punishments violate the Double Jeopardy Clauses of the United States and Texas Constitutions. See [U.S. CONST. AMEND. V](#); [TEX. CONST. ART. I § 14](#).

### **C. *Application***

#### **1. Blockburger Test**

Here, Aggravated Assault with a Deadly Weapon (Count One) required proof of the following elements:

- (1) The offense occurred in Tarrant County;
- (2) Appellant intentionally or knowingly threatened bodily injury to Evonne White on November 26, 2016;
- (3) Appellant used or exhibited a deadly weapon, to-wit, a knife, metal bar, bag, or a metal object.

[C.R. 6].

Meanwhile, the enhanced Assault – Family Violence/ Strangulation charge (Count Two) required proof of the following elements:

- (1) The offense occurred in Tarrant County;
- (2) Appellant intentionally, knowingly, or recklessly caused bodily injury to Evonne White;
- (3) White was a member of Appellant's family or household or was someone with whom he has had a dating relationship;

(4) Appellant intentionally, knowingly, or recklessly impeded White's normal breathing and circulation of blood by applying pressure to her throat or neck with his hand or arm on November 26, 2016.

[C.R. 6].

Under the traditional *Blockburger* test, a reviewing court asks whether each of the two offenses requires proof of an element that the other does not. A review of the above indictments demonstrates that Count Two requires proof that Appellant caused bodily injury to White by using his hand or arm to impede her normal breathing or circulation, while Count One does not. The question then becomes whether Count One requires proof of any element of which Count Two does not require proof. The State could argue that Count One requires proof that a Deadly Weapon was used in the commission of the offense, while Count Two does not require such proof.

However, this superficial observation would not end the inquiry, as Count One would subsume Count Two if the element

in Count Two requiring proof of strangulation requires the same facts as the element in Count One requiring proof of a deadly weapon. In other words, if the facts alleged to prove strangulation also constitute proof of a deadly weapon, then the *Blockburger* test would dictate that punishing Appellant for both offenses violates the Double Jeopardy Clause.

Here, the State could prove its strangulation allegation in count two through proof that Appellant applied pressure on White's neck with his hand, or applied pressure on her neck with his arm. These same manners and means were not alleged in count one to support the allegation that Appellant used or exhibited a metal bar, bag, or metal object.

## **2. Ervin Factors**

The next step is to consider the non-exclusive list of *Ervin* factors. See [Ervin](#), 991 S.W.2d at 814.

Under the first factor, courts consider whether the two offenses are in the same statutory section. Here, both charges are from Chapter 22 of the Texas Penal Code, which is titled

“Assaultive Offenses.” In fact, they are very close together in the penal code, as aggravated assault is contained in Section 22.02, while assault family violence/strangulation is contained in Section 22.01.

Second, the offenses are phrased in the alternative in the indictment. In count one, the State alleged that Appellant threatened imminent bodily injury to White and threatened her with either a metal bar, bag, or metal object. In count two, the State alleged that Appellant strangled White in two alternative ways: (1) applying pressure to her neck with his hand, and (2) applying pressure to her neck with his arm. Due to the alternative phrasing of the manner and means for each offense, along with the overlap between the two counts, there is a risk that Appellant was convicted twice for the same conduct.

Third, the offenses have similar names, including the word “assault.”

Fourth, they have the similar punishment ranges: aggravated assault with a deadly weapon being a second-degree

felony, the punishment range is between two and twenty years incarceration. The assault / strangulation charge being a third-degree felony, the punishment range is between two and ten years incarceration.

Fifth, the two offenses have the same focus: the protection of people from assaultive conduct.

Sixth, this common focus indicates a single instance of conduct, as the allowable unit of prosecution for an *assaultive* offense in Texas is each victim. *Garfias v. State*, 424 S.W.3d 54, 60 (Tex. Crim. App. 2014)(holding the unit of prosecution for aggravated assault is one unit per victim). This factor should be regarded as the best indicator of legislative intent when determining whether a multiple-punishments violation has occurred. *Shelby v. State*, 448 S.W.3d 431, 436 (Tex. Crim. App. 2014). Furthermore, this factor indicates that the Legislature did not intend for one instance of assaultive conduct against a single person to yield convictions for both aggravated assault and assault – family violence/strangulation for injuring one person.

See *Shelby*, 448 S.W.3d at 439-40 (finding that Legislature did not intend for one instance of assaultive conduct against a single person to yield convictions for both aggravated assault with a deadly weapon against a public official and intoxication assault for injuring the same person).

Finally, there is no legislative history indicating any intent for courts to treat the two offenses differently in the double-jeopardy analysis. Considering that the offenses protect a victim from a single instance of assaultive conduct, the offenses should be considered the same for double-jeopardy purposes absent proof of any legislative intent to the contrary.

In *Shelby*, this Court considered whether convictions for both aggravated assault against a public servant and intoxication assault violated the Double Jeopardy Clause. *Id.* at 436-440. The Court found the *Ervin* factors weighed in favor of a finding that the Legislature did not intend for multiple punishments for essentially the same criminal act:

In weighing the eight *Ervin* factors to determine legislative intent, we conclude that the Legislature did

not intend to permit dual convictions for aggravated assault against a public servant and intoxication assault under the circumstances in this case because these offenses share the same gravamen, share similar names, and have some elements that are the same under an imputed theory of liability. Because the best indication of the Legislature's intent in the absence of specific legislative history is the fact that the offenses share the same gravamen, we are persuaded that a double-jeopardy violation has occurred even though the offenses do not have the same punishment ranges and are contained in separate sections of the penal code. We hold that under the facts of this case, the trial court violated appellant's rights against double jeopardy by convicting him of both aggravated assault with a deadly weapon against a peace officer and intoxication assault.

*Shelby*, 448 S.W.3d at 440.

Turning to the present case, the *Ervin* factors weigh even more strongly in favor of a finding that multiple punishments constitutes a double-jeopardy violation, as aggravated assault with a deadly weapon and assault – family violence/strangulation are even more similar than the offenses in *Shelby*. This is demonstrated by the fact that unlike *Shelby*, the two offenses here are situated together in the same penal code chapter, and can be phrased in the alternative. *c.f.* *Shelby*, 448 S.W.3d at

437-38.

**D. *Remedy***

When a defendant is subjected to multiple punishments for the same conduct, the remedy is to affirm the conviction for the most serious offense and vacate the other convictions. *Bigon*, 252 S.W.3d at 372 (the remedy for impermissible multiple convictions and punishments is to retain the most serious offense and vacate the other). Here, Appellant was convicted of aggravated assault, which is a second-degree felony, and assault - family violence / strangulation, which is a third-degree felony. Thus, the court of appeals should have vacated the conviction and sentence for the third degree felony in count two. This Court has the opportunity to clarify the law and remedy the error below.

**PRAYER**

For the foregoing reasons, Appellant respectfully requests that this Court sustain the question presented for review, reverse the opinion of the First Court of Appeals and vacate the conviction for the third degree felony in count two. Appellant

respectfully requests that he be granted any such further relief to which he may show himself justly entitled.

Respectfully submitted,

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#### **CERTIFICATE OF COMPLIANCE**

I hereby certify that the word count for the portion of this filing covered by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure is 2,839.

/s/ Daniel Collins

Daniel Collins

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument has been furnished to counsel for the Tarrant County District Attorney and the State Prosecuting Attorney listed below pursuant to Rule 9.5(b)(1) of the Texas Rules of Appellate Procedure through the electronic filing manager, as opposing counsel's email address is on file with the electronic filing manager, on this 9th day of October , 2019.

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